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No. 89-1401

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

EXXON CORPORATION,
Petitioner,
v.
WYOMING STATE BOARD OF EQUALIZATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Wyoming

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

AMY EISENSTADT *
Tax Counsel
JAMES F. BURESH
PAUL H. FRANKEL
Chairmen, Lawyers
Coordinating Subcommittee
Committee on State Taxation
of the Council of State
Chambers of Commerce
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-8103

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The consent of the Attorney for the Respondent was requested and refused.*

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of

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* The consent of the Petitioner has been filed with the Clerk of this Court.

commerce. The Committee on State Taxation (COST), one of the three advisory committees of the Council, consists of 340 corporate members, including petitioner, who conduct a substantial portion of the interstate commerce of United States taxpayers.

Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST's objective is to preserve and promote equitable and non-discriminatory state taxation of corporations engaged in business in more than one taxing state. COST is, therefore, vitally interested in cases such as the instant case in which a taxpayer is subjected to discriminatory taxation and double taxation because it does business in interstate commerce.

COST's members fully recognize their responsibility to pay their fair share of state tax on an interstate transaction. However, it is also expected that in paying a sales or use tax on a transaction that the tax shall be exacted only once. The state tax laws should not determine where a corporation does business or determine where a taxpayer makes its purchases. Rather, the choice of where purchases are made should be dictated by the quality and choice of goods available. The Commerce Clause is intended to allow an interstate taxpayer to make such tax-neutral busines decisions in a free market.

When a State does not allow an offsetting credit against its use tax for sales or use tax properly paid to another State, that State forces taxpayers to choose between goods based on the location of the vendor (in-state), rather than the quality and price considerations of the natural (all states) marketplace. COST does, therefore, have a great interest in the issue in this case, and urges that leave be granted to file a brief as *amicus*

curiae in support of Petitioner's petition for writ of certiorari and respectfully so moves the Court.

Respectfully submitted,

AMY EISENSTADT *
Tax Counsel

JAMES F. BURESH
PAUL H. FRANKEL
Chairmen, Lawyers
Coordinating Subcommittee

Committee on State Taxation
of the Council of State
Chambers of Commerce
122 C Street, N.W., Suite 330
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(202) 484-8103

* Counsel of Record

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the petitioner's petition for writ of certiorari in the above-captioned case.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae.*

SUMMARY OF ARGUMENT

At issue in this case is whether, under the Commerce Clause of the United States Constitution, a State must allow a credit against a use tax it imposes for sales or use taxes properly paid to another State. In order for a tax to be held valid under the Commerce Clause, it must tax an activity with nexus to the state, the tax must be fairly apportioned, the tax must not discriminate against interstate commerce and the tax must be fairly related to the benefits provided by the state. In imposing its use tax without allowing a credit for tax previously paid to another state, Wyoming fails to fairly apportion its tax and its tax discriminates against interstate commerce by subjecting an item to double taxation on its full value. As imposed by the State of Wyoming, its use tax necessarily results in double taxation of interstate transactions and gives preferential treatment to wholly in-state transactions. Therefore, the imposition of the Wyoming use tax, without an offsetting credit for tax properly paid to another state, violates the Commerce Clause.

ARGUMENT

UNDER THE COMMERCE CLAUSE, A STATE MUST ALLOW A CREDIT AGAINST ITS USE TAX FOR SALES OR USE TAXES PROPERLY PAID TO ANOTHER STATE

In this case, the Court is being asked to determine whether the Commerce Clause requires that a State allow a credit against its use tax for sales or use taxes properly paid to another State. This Court has expressly reserved determining this issue in prior cases. *Williams v. Vermont*, 472 U.S. 14, 21, 22 (1985); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937).

This Court has not yet had to decide whether a State's use tax scheme must include the provision of a credit

for sales and use taxes properly paid to another state in order to meet Commerce Clause requirements because in every case this Court has considered, the State in question has had such a credit provision.[1] In fact, in finding various tax schemes constitutional under the Commerce Clause, this Court has specifically relied on the existence of a credit provision. *Goldberg v. Sweet*, 109 S.Ct. 582, 590, 591 (1989); *D.H. Holmes Co., Ltd. v. McNamara*, 108 S.Ct. 1619, 1623 (1988); *Henneford v. Silas Mason Co.*, 300 U.S. at 584. *See, also, Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S.Ct. 2810, 2819 (1987).

In *Henneford*, this Court stated that if there are limits to a State's sales and use tax scheme "there is no need to mark them now. *It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.*" 300 U.S. at 587 (emphasis added). This Court then noted that the statute at issue allowed an offsetting credit so that "the system has been divested of any semblence of inequality or prejudice." *Id.* In the instant case, however, the State of Wyoming does not provide a credit. Thus, a taxpayer that has paid a sales or use tax in the state of origin is compelled to pay a second tax in the state of destination. Therefore, it is now time for this Court to resolve the issue whether the second exaction of the use tax after the imposition of a tax on the original use discriminates against interstate commerce. *Southern Pac. Co. v. Gallagher*, 306 U.S. at 172.[2]

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[1] The Multistate Tax Commission, an organization comprised of 20 member states and 13 associate member states, expressly requires that its members provide a sales and use tax credit. Article V(1) of the Multistate Tax Compact states that "[e]ach purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision."

[2] In contrast to the decision of the Wyoming Supreme Court, below, in *Montgomery Ward & Co. v. State Board of Equalization*, 272

In order for a state tax imposed on an interstate transaction to be found valid under the Commerce Clause, this Court set forth a four prong test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under the *Complete Auto* test, a tax is constitutionally valid if: 1) the activity that is subject to tax has nexus with the taxing state; 2) the tax is fairly apportioned; 3) the tax does not discriminate against interstate commerce; and 4) the tax is fairly related to the benefits provided by the taxing state. In failing to allow a credit for use taxes paid to another state, the Wyoming use tax scheme violates the second and third prongs of the *Complete Auto* test.

As this Court stated in *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981):

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra*. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

The failure of the State of Wyoming to grant a credit against the use tax it imposes for use taxes paid in

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Cal. App.2d 728, 78 Cal.Rptr. 373 (1969), cert. denied, 396 U.S. 1040 (1970), the California Court held that the failure of the California statutes to provides a credit against its use tax for sales tax properly imposed by the state in which the property was sold and delivered created a burden on interstate commerce in violation of the Commerce Clause.

another State clearly violates these fundamental principles. In not granting such a credit, Wyoming places a greater tax burden on goods purchased out-of-state than on an equivalent transaction taking place wholly within the State. However, if the State did allow a credit, the out-of-state transaction and the wholly in-state transaction would bear the identical tax burden. See, *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S.Ct. 2810, 2819 (1987). Thus, it is readily apparent that the failure of a State to grant a credit against its use tax for a use tax previously paid results in the very creation of preferential trade areas and subjection of interstate businesses to double taxation that the Commerce Clause seeks to prevent.

The intent of the use tax is to complement a State's sales tax so that a purchaser cannot escape paying a tax by making a purchase out-of-state. Implicit in the sales and use tax scheme in that a purchaser shall pay only one sales or use tax on a purchase. In finding the State of Washington's use tax scheme constitutional, this Court stated:

> Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of the purchase or use within the State. It is true in exactly the same measure where the offsetting tax has been paid to another State by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a sales or use tax somewhere. Everyone who has paid a sales or use tax anywhere, or more accurately, in any State, is to that extent to be exempt from the payment of another tax in Washington.

Henneford v. Silas Mason Co., 300 U.S. 577, 583, 584 (1937). "The conclusion is inescapable; equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

The Wyoming use tax does not treat in-state and out-of-state taxpayers equally. Rather, it discriminates in favor of local business and encourages out-of-state operations to move to the State in order to compete on equal terms. See, *Halliburton Oil Well, supra*, at 72.

The absence of a use tax credit discriminates between transactions on the basis of the interstate character of certain transactions. The Commerce Clause is intended to prevent a State from taxing "a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco v. Hardesty*, 467 U.S. 638, 642 (1984). However, this is exactly what the State of Wyoming is doing. If a sales transaction occurs wholly within the State, it is taxed on its full value only once. However, if the transaction is an interstate transaction, it is subjected to double taxation. In violation of the Commerce Clause, Wyoming is discriminatorily taxing products manufactured and business operations performed in another State. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 337 (1977); See also, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

The failure to grant a credit against its use tax clearly discriminates against interstate commerce in violation of the third prong of the *Complete Auto* test. Moreover, the lack of a credit violates the second prong in that the Wyoming tax is not fairly apportioned.

In determining whether a tax is fairly apportioned, the tax must be examined to determine whether it is ex-

ternally consistent. *Goldberg v. Sweet*, 109 S.Ct. at 588. This involves the examination of the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. *Goldberg*, 109 S.Ct. at 589. In this case, where the State of Wyoming refuses to grant an offsetting credit aaginst its use tax for a use tax properly paid in another State, the practical and economic effect of the Wyoming tax on interstate activity is multiple taxation. It results in more than one tax on the full value of the property used in both states and, thereby, fails to apportion the tax. *See, Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979). Such cumulative burdens destroy interstate commerce and encourage the re-erection of the trade barriers which made the Commerce Clause necessary. *General Motors Corp. v. Washington*, 377 U.S. 436, 440 (1964). Thus, this Court has "specifically held that interstate commerce cannot be subjected to the burden of 'multiple taxation.' [cite omitted]." *Id.*, at 440.

Until now, this Court has expressly reserved deciding the issue whether a State must grant a credit against its use tax for a sales or use tax properly paid to another State, finding that the cases before it did not require such a determination. The instant case, however, clearly presents this issue. Insofar as the lack of a credit creates a burden on interstate commerce and results in multiple taxation, it is an issue of great importance to those engaged in interstate commerce. If the decision of the Wyoming Supreme Court is not reviewed, other states will be encouraged to adopt similar unequal tax structures.

CONCLUSION

For the foregoing reasons, the Committee on State Taxation respectfully requests that the Petitioner's Petition for Writ of Certiorari be granted.

Respectfully submitted,

AMY EISENSTADT *
Tax Counsel

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